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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HOWARD HERSHIPS,

Plaintiff,

vs.

THE SUPERIOR COURT OF CALIFORNIA  
COUNTY OF CALIFORNIA, *et al.*,

Defendants.

Case No.: C 06-CV-6644 JF/RS

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION BY STEVEN T. KIRSCH TO  
DISMISS COMPLAINT (F.R.C.P.  
12(b)(6))**

Date of Motion: September 5, 2008  
Time of Motion: 9:00 a.m.  
Ctm: #3, 5<sup>th</sup> Floor  
Judge: The Hon. Jeremy Fogel  
Case Filed: October 25, 2006  
Trial date: None

**I. INTRODUCTION**

Plaintiff Howard Herships maintains that various witnesses, police officers, deputy district attorneys, and even the state superior court have conspired to deprive him of unspecified civil rights by filing a “groundless” criminal complaint where “there is no possibility of obtaining a conviction.” Instead of addressing this concern in the criminal proceeding (which is pending), Herships improperly filed the instant action claiming damages under 42 U.S.C. §1983.

Not only are Herships claims factually deficient, several of the defendants Herships implicated, including movant Steven T. Kirsch, are private citizens, as to whom Herships’ §1983 claims do not apply. Accordingly, Kirsch brings this motion to dismiss Herships’ First Amended Complaint (“FAC”) as to him.

**II. STATEMENT OF ISSUES TO BE DECIDED**

1. Does Herships allege a “civil right” that has been violated or, to the extent he does allege a “civil right,” allege causation of damages?
2. Does Herships allege that Kirsch is a “state actor” who can be liable for a violation of “civil rights?”
3. Does Herships allege specifics of an agreement between Kirsch and a “state actor” to conspire to deprive him of his civil rights so that Kirsch could be liable for “conspiracy to violate civil rights?”

**III. STATEMENT OF ALLEGED FACTS**

Herships brings two claims that implicate Kirsch. In his second cause of action, Herships alleges that Kirsch violated his “Civil Rights” (42 U.S.C. §1983). Herships does not allege that Kirsch is a governmental entity or employee. The only factual allegations Herships makes against Kirsch in this cause of action are as follows:

Kirsch requested witnesses to make reckless statements implicating Herships to a police officer (FAC, ¶ 21);

Kirsch corruptly influenced the Santa Clara District Attorney’s Office by virtue of his being CEO of the Kirsch Foundation, causing it to improperly pursue a criminal matter against Herships (FAC, ¶ 22);

1 Kirsch presented the criminal complaint for an ulterior purpose, viz., to collect a judgment  
2 of \$42,000 that was void on its face (FAC, ¶ 23);

3 Kirsch requested a \$20,000 civil compromise in violation of California Rule of  
4 Professional Conduct 5-100(A) (FAC, ¶ 24);

5 Herships baldly concludes that “[t]he above violations constitutional rights all done under Color of  
6 State Law have been and continuing all being done for consideration of . . . Kirsch position as  
7 CEO of the Kirsch Foundation for giving of grants within the Santa Clara County Community.”  
8 [sic] (FAC, ¶ 29).

9 In his third cause of action, Herships alleges that Kirsch participated in a “Conspiracy to  
10 Violate Civil Rights.” The only additional allegations Herships makes against Kirsch are as  
11 follows:

12 Kirsch conspired with two Santa Clara County district attorneys<sup>1</sup> to prosecute a criminal  
13 case against Herships without probable cause to deprive Herships of liberty and property  
14 without due process of law, so that Kirsch could obtain an advantage in a civil suit (FAC, ¶  
15 33, 37);

16 Kirsch enlisted the aid of defendant Gerald Sorenson and prepped him to testify in the  
17 criminal case in violation of a court order (FAC, ¶ 36);

18 Kirsch requested that Herships be charged with a felony (FAC, ¶ 39);

19 Kirsch requested that Santa Clara County district attorneys seek out a particular judge who  
20 was favorable to Kirsch to issue an arrest warrant for Herships (FAC, ¶ 41);

21 Kirsch conspired with defendant John Everding to make false statements about Herships to  
22 the Santa Clara County district attorneys (FAC, ¶ 42);

23 Defendant Everding made statements in furtherance of a settlement agreement between  
24 Kirsch and another person, which settlement agreement required that person to sign a  
25 declaration implicating Herships in the vandalism of Kirsch’s car (FAC, ¶ 43).

26  
27  
28 <sup>1</sup> The district attorneys were dismissed by order of The Hon. Martin J. Jenkins on August 16, 2007,  
docket #58.

1 It is unclear which civil right Herships claims has been violated, or whether he even alleges  
 2 a civil right of his that has been violated. Rather, he states that he has been deprived of his “right  
 3 to witness to marshal a defense in the small claims case entitled Kirsch v. Herships.” (FAC, ¶ 27)  
 4 Herships alleges that he has “no prospect for obtaining any opportunity for a complete defense to  
 5 the pending criminal charges.” (FAC, ¶ 28) Herships generally states that he was deprived of  
 6 “privileges or immunities secured by the United States Constitution.” (FAC, ¶ 46) Herships states  
 7 he was denied his right to “compulsory service of process in the small claims case.” (FAC, ¶ 47)  
 8 Herships finally concludes that, “[a]t all times . . . the conduct of all the defendants (including  
 9 Kirsch) . . . has deprive plaintiff of rights to Equal Protection of Law and Due Process of Law was  
 10 impeded, in violation of the Fourteenth Amendment to the Constitution . . . and Title 42 U.S.C.  
 11 §1983.” [sic] (FAC, ¶ 49)

#### 12 **IV. ARGUMENT**

13 Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed based  
 14 upon a failure to allege either a cognizable legal theory or sufficient facts under a cognizable  
 15 legal claim. *Balistreri v. Pacifica Police Dept.* 901 F.2d 696, 699 (9th Cir. 1990). Herships  
 16 does not allege cognizable claims against Kirsch for “Violation of Civil Rights” under 42 U.S.C.  
 17 §1983 or for “Conspiracy to Violate Civil Rights” under 42 U.S.C. §1983.

##### 18 **A. Herships Fails to Allege a Civil Right That Has Been Violated**

19 Herships apparently does not allege a violation of a civil right, as it is unclear that a “right  
 20 to marshal a defense” in a civil case is a protected right. Even were it a protected right, it’s  
 21 premature for Herships to allege that a violation of any such right damaged him, or how it  
 22 damaged him. And, the criminal trial has not occurred yet, so Herships can’t allege violation of  
 23 the “right to fair trial.” For these reasons alone, Herships’ claims against Kirsch should be  
 24 dismissed.

##### 25 **B. Herships Fails to Allege a Claim For “Violation of Civil Rights” Against Kirsch,** 26 **Because He Does Not Allege That Kirsch Is a “State Actor”**

27 §1983 of Title 43 of the United States Code allows persons to sue state actors for civil  
 28 rights violations. But nongovernmental private defendants may not be held liable under

§1983 unless their actions were “state action” and the deprivation occurred under color of state law. *Daniel v. Ferguson*, 839 F.2d 1124 (C.A.5 (Tex.) 1988) citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924, 102 S.Ct. 2744, 2747, 73 L.Ed.2d 482 (1982) and *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). Indeed, a private citizen like Kirsch may be subject to liability under §1983 only if he willfully participated in a conspiracy with the state or one of its agents. *Bowman v. City of Franklin*, 980 F.2d 1104, 1107 (7<sup>th</sup> Cir. 1992), citing *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352 (7<sup>th</sup> Cir.1985).

A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act . . . where those persons agree to inflict an injury upon another and where there is an overt act resulting in damage. *Hampton v. Hanrahan*, 600 F.2d 600, 620-23 (7<sup>th</sup> Cir. 1979), cert. denied, 446 U.S. 754 (1980). Fundamentally, a civil conspiracy requires an agreement. *Kunik v. Racine County, Wis.*, 946 F.2d 1574 (7<sup>th</sup> Cir. 1991). In order to prove such a conspiracy, a plaintiff must show that the parties reached an understanding to deny the plaintiff his or her rights. *Lowe v. Aldridge, et al.*, 958 F.2d 1565, 1573 (11<sup>th</sup> Cir. 1992).

Herships’ second cause of action against Kirsch, for violation of “Civil Rights,” does not allege that Kirsch is a state actor. Nor does Herships even generally allege an agreement or conspiracy. For these reasons, Herships’ second cause of action, his claim for “Violation of Civil Rights” must be dismissed against Kirsch.

**C. Herships’ Conclusory Allegations Are Insufficient to Establish a “Conspiracy to Violate Civil Rights” Against Kirsch**

In his third cause of action, Herships alleges that Kirsch conspired to violate his civil rights under §1983.

A complaint for “Conspiracy to Violate Civil Rights” must contain more than mere conclusory allegations of such a conspiracy; a factual basis for such allegations must be provided. *Bowman v. City of Franklin*, 980 F.2d at 1107, citing *Leahy v. Board of Trustees of Community College District No. 508*, 912 F.2d 917, 922 (7<sup>th</sup> Cir.1990); see also *Spear v. Town of West Hartford*, 954 F.2d 63, 68. Indeed, a civil conspiracy requires an agreement. *Kunik v. Racine County, Wis.*, 946 F.2d 1574 (7<sup>th</sup> Cir. 1991). However, Herships simply makes conclusory

1 allegations that Kirsch “conspired” with the other defendants. (FAC, ¶ 43). Herships fails to  
2 allege any agreement. As such, his claim for “Conspiracy to Violate Civil Rights” against Kirsch  
3 must be dismissed.

4 **V. CONCLUSION**

5 Herships’ Complaint is a fabricated jumble of facts apparently calculated to allow him to  
6 leverage some advantage from defendants. But he shouldn’t be allowed to continue unless he has  
7 some viable claims, which he does not.

8 For the reasons set forth above, Kirsch respectfully requests that Herships’ claims in the  
9 FAC be dismissed with prejudice against him.

10  
11 Dated: July 18, 2008

REDENBACHER & BROWN, LLP

*John C. Brown*

By: \_\_\_\_\_

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STEVEN T. KIRSCH